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In The Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHARLES L. HOLLIDAY
LAW OFFICES OF
JEFFREY A. GARRETY
65 Stonebridge Blvd.
Jackson, TN 38305

SETH M. GALANTER
Counsel of Record
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-6947
sgalanter@mofo.com

BENJAMIN R. CARLISLE
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104

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REPLY BRIEF FOR PETITIONER

Respondents' refusal to defend the court of appeals' plainly erroneous holding—that the Religious Freedom Restoration Act (RFRA) does not apply to federal civil actions in federal court unless the federal government is a party—is no reason to deny review. Their silence does not negate the need to resolve the acknowledged conflicts in the courts and establish a uniformly broad reading of this remedial statute.

Nor is there anything that makes this case a poor vehicle to decide the issue. The Sixth Circuit relied solely on the legal issue regarding scope of RFRA in ruling against petitioner, and if petitioner is correct that his conduct is protected by RFRA, then any civil contempt order will be nullified.

A. The Court Of Appeals' Decision Addresses A Recurring Question In A Common Factual Circumstance

Rather than defend the holding of the Sixth Circuit, respondents acknowledge that the court of appeals' holding is in tension with respondents' status as "staunch supporter[s] of religious freedom." Br. in Opp. 23. It is so contrary to their normally "broad interpretation of RFRA" (Br. in Opp. 23), that they intimate—but do not go so far as to state—that they would not defend the Sixth Circuit on the merits if certiorari is granted. Br. in Opp. 23, 24, 25.

Respondents suggest (Br. in Opp. 2) their presence as plaintiffs seeking to enforce federal law against

other religious persons is anomalous. Yet these respondents routinely appear in federal court as plaintiffs, seeking to enforce their alleged federal intellectual property rights against other religious persons. *See, e.g.*, *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228 (9th Cir. 1989); *General Conference Corp. of Seventh-Day Adventists v. Federation of Jewish Adventist Soc'y*, No. 3:08-cv-02170 (S.D. Cal. Mar. 13, 2009), ECF No. 23 (settlement agreement); *General Conference Corp. of Seventh-Day Adventists v. Trinidad Adventist Church*, No. 1:08-cv-01402 (D.D.C. Dec. 29, 2008), ECF No. 11 (consent decree); *General Conference Corp. of Seventh-Day Adventists v. Perez d/b/a Eternal Gospel SDA Church*, 97 F. Supp. 2d 1154 (S.D. Fla. 2000); *General Conference Corp. of Seventh-Day Adventists v. Emanuel Seventh Day Adventist Church*, No. 1:98-cv-02558 (S.D.N.Y. Aug. 26, 1998), ECF No. 9 (default judgment); *General Conference Corp. of Seventh-day Adventist v. Seventh-day Adventist Kinship Int'l, Inc.*, No. 87-8113, 1991 WL 11000345 (C.D. Cal. 1991).

Other churches and religious organizations likewise regularly use federal courts and federal law to police the use of what they claim is their intellectual property. *See, e.g.*, *Community of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, No. 10-1707, 2011 WL 941469 (8th Cir. Mar. 21, 2011); *National Spiritual Assembly of*

Baha'is of United States Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of the Baha'is of United States, Inc., 628 F.3d 837 (7th Cir. 2010); *see also* Amicus Br. of The Rutherford Inst. at 14-16 (collecting additional cases).

As amicus The Rutherford Institute explains (at 13-14), unlike federal employment law, which has both statutory and judicially-crafted doctrines that alleviate the burden of generally applicable laws on religious employers, federal intellectual property law offers no protection to persons of faith. Thus, resolving the question whether defendants in such suits are entitled to invoke RFRA's protections is an issue that will substantially clarify the rights of religious persons on both sides of such litigation.[1]

B. Contrary To Respondents' Claim, The Courts Of Appeals Are Divided On The Scope Of RFRA

The circuits are divided on the scope of RFRA. Respondents admitted it below. In their court of appeals' brief, respondents stated that the Sixth Circuit

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[1] If certiorari is granted, this Court has the tools to assure that the Sixth Circuit's holding is defended even if respondents follow through on their suggestion that they would support the position of the petitioner on the merits, as contemplated by this Court's Rule 12.6. This Court has regularly appointed an amicus to defend a lower court's holding in cases in which nongovernmental respondents will not do so. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 129 S. Ct. 1693 (2009) (mem.); *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 917 (2001) (mem.).

had "never ruled that RFRA applies to cases between private parties and *courts in other circuits are split*." Resp. C.A. Br. 56 n.3 (emphasis added); *see also* Br. in Opp. 24 n.9 (citing this footnote as part of respondents' considered approach in the court of appeals). In their brief in opposition, respondents continue to admit there is a split (Br. in Opp. 1, 9, 15), but they erroneously claim it does not extend to this case.

Respondents agree that, like the Sixth Circuit below, the Seventh Circuit has held that unless the federal government is a party to the action, RFRA's defense is not available to a defendant. Br. in Opp. 14-15 (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006)).[2]

By contrast, the Eighth Circuit held that RFRA applied to an action in federal court because the federal courts are part of the "government" governed by RFRA. Pet. 12 (citing *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998)).

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[2] The Sixth Circuit read two Ninth Circuit decisions to reach the same conclusion. Pet. App. 20a-21a. As the petition explained (Pet. 14) and respondents agree (Br. in Opp. 14 n.5), however, the Ninth Circuit formally left the issue open even while expressing doubts that a defendant could rely on RFRA absent the federal government as a party.

Respondents claim (Br. in Opp. 12) that that decision was only focused on the question of whether RFRA applied to that case based on its timing (where the judicial proceeding was initiated before RFRA was enacted). In deciding whether the RFRA applied, the court had to decide whether "the implementation of [any federal] law" occurred after RFRA's effective date. 42 U.S.C. § 2000bb-3(a). The Eighth Circuit concluded that "the federal courts are a branch of the United States, and our decision in the present case would involve the implementation of federal bankruptcy law." *Christians*, 82 F.3d at 1417.

Respondents additional suggestion (Br. in Opp. 12-13) that the Eighth Circuit in that case *could* have relied on the bankruptcy trustee's status as a person acting under color of law is irrelevant. That was not the basis of the court's holding.

Moreover, the Second Circuit and D.C. Circuit have both permitted invocation of RFRA's protections by defendants sued by private parties. Pet. 11, 13 (citing *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)). To be sure, those cases involved federal statutes that allowed both the federal government and a private person to enforce a substantive federal standard. But nothing in the courts' reasoning limited RFRA's scope to those situations. While *Hankins* reserved the question for another day, there is nothing in the text of RFRA that could make it applicable only to those federal laws that *could be* enforced by

the federal government in federal court. And certainly the D.C. Circuit made no such distinction.

Respondents further speculate (Br. in Opp. 18), that the split they acknowledge may vanish because the Second Circuit "may well vote *en banc* to overrule" *Hankins*. That is an odd argument for them to make, because respondents joined an amicus brief in the Second Circuit that urged the court of appeals that *Hankins* was correct in holding that "RFRA operates to restrict the exercise of governmental power, and so may apply even in disputes between private parties where the government's powers are invoked." Br. of Amicus Curiae of the Salvation Army National Corp. et al. at 14 n.9, *Rweyemamu v. Cote*, No. 06-1041, 2006 WL 6222112 (2d Cir. June 21, 2006).

But, in any event, that would not eliminate the D.C. Circuit's opinion, which held that a private plaintiff's federal claim (as well as the federal government's claim) was barred by RFRA. *See Catholic Univ.*, 83 F.3d at 470. Nor would it eliminate the Eighth Circuit's decision holding that federal court involvement is sufficient. *See Christians*, 82 F.3d at 1417.

C. This Case Cleanly Presents The Question Regarding The Scope Of RFRA

Respondents point to three case-specific factors that, they claim, make this case a poor vehicle. They are mistaken.

1. Respondents first contend that petitioner waived his RFRA defense by not raising it in a timely

fashion in the district court. Br. in Opp. 19-20. The court of appeals, however, elected to reach the merits of the RFRA claim, and expressly decided not to address respondents' waiver argument. Pet. App. 17a n.3. Because the RFRA issue was pressed by petitioner *and* passed on by the court of appeals on the merits, the issue is properly presented for this Court's review. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Moreover, petitioner did not waive reliance on RFRA by failing to expressly invoke the statute in his answer. Federal Rule of Civil Procedure 8(b) provides that a party must state "in short and plain terms its defenses." Petitioner did precisely that. In his *pro se* answer, petitioner pled as an affirmative defense that his "religion mandates the use of CREATION SEVENTH DAY ADVENTIST to describe [his] faith and practice of religion" and thus respondents' "claims would infringe the First Amendment to the U.S. Constitution." Dt. Ct. Dkt. 2 ¶ 71. Even though the First Amendment, rather than RFRA, was invoked, this defense put respondents on notice that petitioner was putting at issue the burden the respondents' proposed relief would have on his sincerely-held religious beliefs. That is all that is required. *See Blonder-Tongue Labs. Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971) (the purpose of Rule 8 requiring affirmative defenses to be plead in answer "is to give the opposing party notice"). As this Court recently explained in interpreting Rule 8(a), a statement will meet the "short and plain" statement

requirement without "an exposition of [the parties'] legal argument" or "pin[ning] [a] claim for relief to a precise legal theory." *Skinner v. Switzer*, No. 09-9000, 2011 WL 767703, at *6 (U.S. Mar. 7, 2011).

Furthermore, Sixth Circuit case law would have led petitioner to believe he could raise this affirmative defense in a motion, even if not expressly raised in the answer. *See Golden v. Commissioner of Internal Revenue*, 548 F.3d 487, 494 (6th Cir. 2008) (affirmative defense may be "raised by motion"); *Huss v. King Co.*, 338 F.3d 647, 652 (6th Cir. 2003) ("If a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice."); *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997) ("Although [defendant] did not raise either defense before the second motion for summary judgment, we do not believe this is fatal. Failure to raise an affirmative defense by responsive pleading does not always result in waiver."); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) ("It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver.").

2. Respondents also argue that the district court's injunction against petitioner could be sustained on grounds apart from the merits of the trademark dispute, *i.e.*, that the district court entered a default judgment based on petitioner's refusal to mediate his claim. Br. in Opp. 21-22. But the court of appeals disagreed. It held "given that [petitioner]

fully and properly litigated the summary-judgment stage, we take the summary judgment order as properly before" the court on the merits. Pet. App. 28a. It rejected respondents' contention that "the default-judgment order superseded the summary judgment order." Pet. App. 10a.

Furthermore, the Sixth Circuit correctly held that even if the injunction was based on the entry of a default judgment, it was still obliged to look at the merits question because entry of a default judgment is appropriate only when the facts alleged are sufficient to support a judgment of liability. Pet. App. 10a; *Ohio Cent. R.R. Co. v. Central Trust Co.*, 133 U.S. 83, 91 (1890) ("[A]lthough the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree."); 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2688 (3d ed. 2010) ("Even after default, * * * it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.").

Additionally, the entry of the default judgment was a sanction for petitioner failing to attend a mediation session agreed to by petitioner's then-counsel without petitioner's agreement. But petitioner, who was already on mission in Africa at the time, explained that returning to negotiate over the name of

his church would be contrary to his sincere belief that the name of his church was dictated to him by divine revelation. Dt. Ct. Dkt. 71 at 2; Dt. Ct. Dkt. 89 at 3. If petitioner is correct that RFRA does govern the conduct of the district court in this action, then the entry of default judgment itself would be subject to reexamination since petitioner will be able to show that requiring him to participate in mediation would have substantially burdened his sincerely-held religious beliefs.

3. Relatedly, respondents suggest that petitioner's post-judgment conduct weighs against hearing this petition. Br. in Opp. 22. But, as respondents' reference in passing, the facts surrounding petitioner's conduct are disputed. Br. in Opp. 9. A magistrate judge made recommendations to the district court in December 2010 that petitioner be found in contempt for "instruct[ing]" a third party (Mr. Lucan Chartier) to violate the court's injunction not to use the term "Seventh-day Adventists" in the sign for the church. Br. in Opp. 9 (quoting Dt. Ct. Dkt. 160 at 2).[3]

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[3] The magistrate judge also determined that petitioner was ignoring "the numerous exhortations within [the] Bible for believers to obey the civil authorities, institutions and law." Dt. Ct. Dkt. 160 at 4 n.1 (citing Romans, Peter, Titus, and Matthew). The magistrate judge went on to find that "Acts 4 and 5 of the Bible [which] involve Peter and others disobeying civil authority when they are ordered not to speak of Jesus or in His name" were "clearly *not* analogous to the present case." *Id.* at 5 n.2. Petitioner has urged the district court that these statements raise independent concerns regarding the approach adopted by the magistrate judge to this case.

That recommendation, and the underlying findings, are currently on appeal before the district court on de novo review. 28 U.S.C. § 636(b)(1).

Moreover, petitioner would be properly pursuing this appeal from the injunction even if he has not complied with all its strictures. If the district court's injunction is reversed, then any civil contempt orders flowing from that injunction will also be negated, because civil contempt orders only serve to attain prospective compliance with the injunction. *See United States v. United Mine Workers*, 330 U.S. 258, 294-295 (1947); *Worden v. Searls*, 121 U.S. 14, 27 (1887); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921 (6th Cir. 1978). (A different rule applies to criminal contempt orders, which attempt to punish a person for past conduct, but respondents do not argue that the district court has imposed any such orders.)

Petitioner recognizes that he may have to face civil consequences from the federal courts if this Court refuses to review this case and the injunction remains in effect. But when Congress enacted RFRA, it intended to reduce those circumstances in which persons are forced to choose between their obligations to civil authority and their obligations to God. Review is warranted to give RFRA its intended breadth.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES L. HOLLIDAY
LAW OFFICES OF
JEFFREY A. GARRETY
65 Stonebridge Blvd.
Jackson, TN 38305

SETH M. GALANTER
Counsel of Record
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-6947
sgalanter@mofo.com

BENJAMIN R. CARLISLE
MORRISON & FOERSTER LLP
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